STATE OF MICHIGAN

COURT OF APPEALS

JOYCE DEBOSE-TILLMAN,

Plaintiff-Appellant,

v

ECS PARTNERSHIP, a/k/a ERROL SERVICE, d/b/a MCDONALD'S RESTAURANT,

Defendant-Appellee.

UNPUBLISHED
April 3, 2008

No. 277134
Macomb Circuit Court
LC No. 2005-004099-NO

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action involving a slip and fall on a wet restaurant floor. The trial court determined that defendant was entitled to summary disposition because the condition was open and obvious. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Invitors "are not absolute insurers of the safety of their invitees." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). The "open and obvious" doctrine "attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Id*., p 612. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted). However, the duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*., pp 516-517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent

person, not on the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

When viewed in a light most favorable to plaintiff, the evidence showed that the hazardous condition, specifically the moisture on the floor, was visible upon casual inspection. Plaintiff initially testified that she "probably" would have seen the wetness had she looked down and then agreed that she would have seen it if she had looked down. Another restaurant patron, Harlem Swain, saw moisture on the floor after entering the restaurant, before he knew that plaintiff had fallen. Plaintiff relies on photographs to demonstrate that the visibility of water on the tile depended on the glare that could be seen from a particular position. She provides a detailed explanation of what water conditions are purportedly depicted in each of the photographs, but there is no evidentiary support for the descriptions; the affidavit of plaintiff's counsel concerning the photographs does not include these descriptions. Moreover, there was no testimony that the photographs accurately depicted the degree of wetness of the tile at the time of plaintiff's fall.

Plaintiff's reliance on *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005), to argue that the condition had "special aspects" because it was unavoidable is misplaced. The evidence in this case did not indicate that there was no wetness-free path for plaintiff in the restaurant.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette